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In the

# Supreme Court of the United States

OCTOBER TERM, 1956

LESLIE E. BROWN, Individually, and as Next Friend for NORMAN BROWN, a Minor,

*Petitioner,*

*v.*

PANHANDLE AND SANTA FE RAILWAY COMPANY,

*Respondent.*

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*To the Honorable, the Supreme Court of the United States:*

The Brief of the Respondent is so devoid of merit that we do not feel that we should attempt to answer same in any great detail except to say that the number of judges that passed upon the case is of no controlling importance where those judges have acted arbitrarily, capriciously and in such a manner as to deny to petitioner due process as same has been discussed and defined by the decisions of this Honorable Court cited in our original petition.

We would here like to discuss, since we were unable to do so in our original petition, our theory that the findings of the jury raised the issue of discovered peril. It has long been the settled law that it is not necessary to submit undisputed issues of fact to the jury. This is particularly true where one of the defendants' witnesses makes admissions against the defendant that are admissible as admissions. On page 494 of the record, C. T. Washington made the following admissions:

> "Q. I want to know, are you right, now, when you say that you did tell them it was going to leave on Track No. 6?
>
> "A. Well, they asked me if there was a train going to Sweetwater and what track it was on and I told them, 'Track No. 6.'
>
> "Q. And you know that your duty was not to tell them that and on the other hand your duty was to warn them of their danger, wasn't it?
>
> "A. Well, sir, yes, sir, in a way it was danger to warn them of their—in a way to warn them of their danger, yes, sir."

The fact that C. T. Washington knew that it was a hidden danger and that the boys did not recognize it is shown in the following testimony, without dispute:

> "Q. All right. Now, the way you think that accident happened is that it came in there and due to that very peculiar—I believe you said that due to that way that thing came in there on the lead track and the way it had to get back over there, in your deposition, that the boys might have had a minute and a half to see if they could have seen it at all, isn't that right?
>
> "A. Yes, sir.

"Q. And then you said you don't know, you doubt very much, since the diesel engine doesn't put out very much smoke, you doubt if they could see any smoke at all from down there at the depot, didn't you?

"A. Yes, sir, unless the engine would have been working.

"Q. And the way you think that thing really happened is that they looked up there and couldn't see it and then it came in there on that short track and hooked on and backed up before they knew about it, isn't that right?

"A. Well, I didn't say that was the way it happened, no, sir."

The above testimony, coming from the switching foreman who had charge and control of the defendant's train, C. T. Washington, on the occasion in question, rendered unnecessary any submission of any issue as to whether or not C. T. Washington discovered the dangerous and perilous position of Norman Brown prior to the accident in question. The theory of discovered peril which the plaintiff specifically plead was as follows:

"(g) Plaintiff alleges that the defendant's switchmen actually discovered the dangerous and perilous position of the said Norman Brown prior to the accident in question in that the defendant's switchmen knew that in order to get to Track No. 7 that it would be necessary for the said Norman Brown to cross over or under or between box cars which were located on Track No. 3, or at least knew that said cars constituted a hidden danger to the said Norman Brown and in this connection plaintiff alleges that the defendant's switchmen knew that the cars on Track No. 3, or some of them, were about to be moved, and that the said defendant's switchmen then and there knew that the

said Norman Brown might not or probably would not extricate himself from such dangerous position, and plaintiff alleges that after the said switchmen knew that the said Norman Brown was in a dangerous and perilous position by virtue of proceeding toward said hidden and latent danger, that the said defendant's switchmen then and there failed to warn the said Norman Brown, and then and there failed to use ordinary care and use the means then and there at his command to have avoided said accident, and plaintiff alleges that the failure of the defendant switchmen to exercise ordinary and reasonable care and to use such means then and there at their command, which said means could have been used with reasonable safety to the defendant switchmen and the defendant's property, constitutes negligence upon the part of the defendant herein, which said negligence was a proximate cause of plaintiff's damages and injuries, and renders the defendant liable to respond to the plaintiff herein for all the injuries and damages sustained by the said Norman Brown."

The findings of the jury, in answer to Special Issue No. 30, was as follows:

"Do you find from a preponderance of the evidence that the defendant switchman, C. T. Washington, should have warned Norman Brown that there was not only a train upon Track No. 6 or 7, or upon a track preparing to go to Dallas, but that there was also a long string of box cars standing still upon Track No. 3 and that switching operations were being carried on, which might result in cars that were apparently standing still being suddenly moved?

"Answer 'yes' or 'no.'

"Answer: Yes."

In answer to Special Issue No. 31, the jury found that this failure to give such warning constituted negligence.

and in answer to Special Issue No. 32, that such negligence was a proximate cause of plaintiff's injuries and damages. Bearing in mind the rule announced by the Supreme Court of Texas in *Ford v. Carpenter*, fully discussed in our original petition for certiorari, it is the duty of this Honorable Court to make the construction called for by the pleadings and the evidence in this case. No other construction can be given in that this finding of the jury not only amounted to a finding that Washington knew of the danger of the boys, *but this was a finding that the switchman, Washington, knew that the boys were going to cut across, between or crawl under these cars standing on Track No. 3, and further, that the boys would probably be unable to see the train, and at the time they were crawling under said cars that were apparently standing still, that the box cars might be suddenly moved, and that Washington had knowledge of all of these facts.*

The opinion of the Supreme Court of Texas in *Ford v. Panhandle & Santa Fe, 252 S. W. 2d 561*, is squarely in point here. We quote from various portions of that opinion as follows:

> "In an opinion by Chief Justice Gaines in the Finn case, the Supreme Court undoubtedly adopted the rule laid down in the Munn case by saying: 'The case was submitted to the jury solely upon the ground of discovered peril, and, the jury having found that the servants of the company discovered that the plaintiff was in a perilous position, *or about to enter such position*, in time to have avoided the injury by the means at their command, we cannot reverse the judgment if there be any evidence to justify the verdict.'

"In the Gehring case (134 S. W. 291) the Court condemned a charge that did not impose a duty of care toward one near railroad tracks unless it appeared that he 'would certainly be injured unless the operatives of the car could prevent it.' The Court asked: '*When * * * the proximity of deceased to the track was such as to excite in his (the motorman's) mind an apprehension that the deceased would surely be struck if he continued walking as he was*, and when it was apparent that he did not hear the ringing of the gong, could the motorman delay action until such time as he realized that the deceased would certainly be injured unless he prevented it?' The Court answered: 'We think not. * * * *It is the knowledge by the operatives of the danger of injury and not the certainty of injury, that calls forth the action.*'

"In the first Higginbotham case (155 S. W. 1027) the plaintiff was hit by a train while he was apparently absorbed in trying to get his horses off a railroad track. With reference to the duty owed to the plaintiff by the train operatives, the Court said: 'It was not necessary, in order to charge them with the duty of using the means at their command to prevent injury to the deceased, that they should have believed or thought it certain that deceased would not get out of the way of the train. * * * If the circumstances reasonably indicated to said operatives the probability of his not getting off the track, they were not authorized to speculate on whether he would or would not get off, and take the risk of killing him when it was in their power to prevent injuring him. *If the doctrine of discovered peril only applied when the operatives of a train were certain that the person injured was in peril of life and took no steps to save him when his injury could have been prevented, the necessary proof in every case in which discovered peril is a ground of recovery would show a case of murder or criminal negligence. Such proof is not necessary.*'

"In the case of Hines v. Arrant (225 S. W. 779) the defendant railroad requested a special charge on discovered peril which would have exculpated it of liability unless 'the engineer actually knew that plaintiff would attempt to cross the track in front of the train.' The Court of Civil Appeals said: 'The charge requires the jury to find too much in order to reach the conclusion that the engineer should use the facilities at his hand to stop the train. He could not in the very nature of things actually know what was in the mind of the appellee as the latter was driving toward the crossing. It was his duty, if he discovered the appellee approaching the crossing and *could reasonably infer that he would likely undertake to cross the track, to use the facilities at hand to prevent a collision*, either by stopping or by lessening the speed of his train, or by giving some warning of the train's approach. *He had no right to wait until he was absolutely certain that the traveler was going into a place of danger before taking the proper steps to avoid injuring him.*'

"In the Wagner case (298 S. W. 533) a case in which a pedestrain was killed while running across a track in front of a train, the court, speaking through Commissioner, P. J. Harvey said: '*In order for a person to be in peril, it is not necessary that bodily injury will certainly be suffered by him. He is in peril whenever he is pursuing a course which probably will terminate in serious bodily injury to him. Whenever it reasonably appears to a second person is held to have knowledge of the peril of the other.*'

"A few other cases illustrating from an application of the law to the facts that certainty of injury and knowledge thereof was not made the basis for applying the doctrine of discovered peril, are Verble v. Schaff, Tex. Com. App., 251 S. W. 1023; Houston E. W. T. Ry. Co. v. Kopinitsch, 114 Tex. 367, 268 S. W. 923; Houston E. & W. T. Ry. Co. v. Sherman, Tex. Com. App., 12 S. W. 2d 241; Texas & N. O. R.

Co. v. Krasoff, 144 Tex. 436, 191 S. W. 2d 1, Sisti v. Thompson, 149 Tex. 189, 229 S. W. 2d 610. Other such cases might be added ad infinitum.

"The language quoted from the Napier and the Parks cases should be disapproved only after the most careful re-examination. A reading of the opinions will leave no doubt but that both cases were correctly decided.

"Commissioner German in his opinion in the Napier case cites no authority for his statement that one approaching a railroad track is never in a position of peril until he reaches a point where he cannot stop short of the track. The only case cited as supporting the language quoted from the Parks case is the case of Texas & P. Ry. Co. v. Brown, 142 Tex. 385, 181 S. W. 2d 68. The first case cited in the Brown case in support of the holding there made is the Shetter case, which, on the point under discussion, had long since been repudiated as a precedent.

"To give our sanction to the rule advocated by respondent would be virtually to destroy the doctrine of discovered peril. It would mean that a duty to act never arises until there is certainty of injury, although there is every reason to believe that injury probably will occur. It would also mean that no duty to act arises unless the person in peril is unable to extricate himself therefrom although there is full realization that he is unlikely to do so. Such is not the basis of the humanitarian doctrine of discovered peril.

"If no vehicle were in a position of peril until it reached a point where it was impossible to stop it short of collision, the time for acting would rarely be sufficient to impose a duty to act. *If a pedestrian were never in a position of peril until he took the last step placing himself in front of a moving train or vehicle, then he could never recover under the doctrine of discovered peril because until he took the last and final step it lay in his power not to take it.*"

Under the above case, *these boys were in a position of peril when the evidence is construed most favorably from the time they left, walking down the cars alongside Track 3 in full view of Washington and with Washington's knowledge that they were going to cut across at the depot to Track No. 6, and with Washington's knowledge at that very time that this long string of box cars might be suddenly moved and would be moved suddenly at a time when the boys could not see or hear the engine, and such knowledge upon Washington's part, under his own undisputed admissions, plus the findings of the jury, entitled petitioners to recover upon the doctrine of discovered peril* as same has been so ably discussed by Mr. Justice Calvert in *Ford v. Panhandle & Santa Fe Railway Company.*

A group of issues similar to the issues here presented was held to raise the issue of discovered peril in a situation similar to the case at bar in *East Texas Theatres v. Swink*, *173 S. W. 2d 224*. This case was reversed by the Supreme Court of Texas, in *177 S. W. 2d 195*, but it was not reversed because of a failure of the findings to raise the issue to find discovered peril, but because the evidence in the case shows that there was not time after the discovery of the peril in the *Swink* case to have done anything about it. The issue of time here was some thirty minutes, and the matter of time in this case appears in this record without dispute to have been sufficient. Of course, contributory negligence is not a defense in the event this honorable Court should hold with petitioner on discovered peril. We further respectfully submit that the evidence was insufficient to support the find-

ings of the jury as to any contributory negligence on the part of the boys, and we are further of the opinion and respectfully submit to the court that respondent having failed to obtain a finding as to what an *ordinarily prudent boy* would have done, *failed to obtain a finding of negligence as a matter of law upon the part of petitioner.* We further contend that Special Issue No. 68 acquits Norman Brown of any charge of contributory negligence. The Amarillo Court had no right to discuss how intelligent Norman Brown was, since it has no place in this law suit. *A motion for Judgment Non Obstante Veredicto is necessary to support a claim that a jury finding is without support in the evidence under settled Texas law.* Without further ado we submit the following from *45 C. J. S., page 715:*

> "Knowledge and appreciation of the danger or risk of injury, actual or imputed, are essential in order that a child may be guilty or contributory negligence.
>
> "Knowledge and appreciation of the danger or risk of injury, actual or imputed, are essential in order that a child may be guilty of contributory negligence. Mere knowledge that injury might result, without appreciation of the risk of injury to which its conduct exposed it, is not sufficient. It is not necessary, however, that it actually know and appreciate the danger; it is sufficient if it was so obvious that an ordinarily prudent child of the same capacity for knowing and appreciating the danger or risk would have known and appreciated it under the same or similar circumstances. However, unless the danger was of such a character, knowledge and appreciation thereof will not be imputed to a child who was not actually aware of it.
>
> "Momentary forgetfulness. Momentary forgetfulness of, or inattention to, a known danger will not al-

ways constitute negligence, but the circumstances of the particular case must be considered.

"§149—Particular Acts and Omissions

"A child, who exposes itself to a danger or risk of injury which it knows and appreciates, or should know and appreciate, or which it has been warned to avoid, may be guilty of contributory negligence, but the conduct of a child in an emergency which under other circumstances would be negligence may not amount to contributory negligence. The mere fact that a child is a trespasser is not conclusive of contributory negligence.

"Except where the child is so young as to be incapable of exercising any care for its own safety, as discussed supra §145, a child who knows and appreciates, or should know and appreciate, the danger or risk from which its injury might reasonably be anticipated, must exercise reasonable care to avoid such danger, and one who by its conduct exposes itself thereto may be guilty of contributory negligence, even though the resulting injury is greater than it anticipates. However, the mere fact that the child knew and appreciated or should have known and appreciated, the danger, does not necessarily show negligence on its part. It is not negligent, if, under the same or similar circumstances, *AN ORDINARILY PRUDENT CHILD* of the same capacity for avoiding danger would have acted as it did or where its failure to exercise such care did not contribute as a proximate cause to its injury.

"Disregard of warnings. A child who exposes itself to a danger or risk of injury which it has been warned to avoid may be guilty of contributory negligence, even though it does not realize the full extent or degree of the risk which its conduct involves. Knowledge and appreciation of the danger will not be imputed to the child, however, where the warning re-

lated to a cause entirely different from that which resulted in the injury. Likewise, a child will not be deemed guilty of contributory negligence, notwithstanding it has been warned of the danger, if, under the same or similar circumstances AN ORDINARILY PRUDENT CHILD of the same capacity for appreciating and avoiding danger or risk of injury would have exposed itself to the danger."

A New Jersey Court has recently examined the age problem under the "Attractive nuisance" doctrine within the framework of Sec. 339 of the Restatement of Torts. In *Hoff v. Natural Refining Products Co.*, 118A 2d 714, a 13-year 8 months old boy was harmed when a part of defendant's chemical mound, some 50 feet high, caved in, causing the boy to fall, resulting in a broken leg and other injuries. The chemical pile was located in an urban, mixed industrial and residential area bordered by city streets. Plaintiff and other boys had frequently for years past climbed and played on the pile, but the boys had never been warned away, nor was there any fence or other barrier to free access. The injured boy was an "average" student in elementary school, in the 8th grade at the time of the accident, and his grades had been "good" before the accident. The trial Judge granted defendant's motion to dismiss on the ground that since plaintiff was not a child of such tender years as to be unable to recognize the danger and appreciate the risks in playing on the refuse pile, defendant had not breached any duty to this boy. The Court ruled he was of sufficient age to size up and avoid the danger. Plaintiff appealed. Held, reversed and remanded for a new trial. Whether the 13-

year 8-month old plaintiff was old enough to appreciate and avoid the danger was a question of fact for the jury.

The latest edition of the *N. A. C. C. A. Law Journal* in reviewing this case says:

> "With broad and fastidious scholarship, Judge Conford considered a large number of out of State decisions bearing on the age problem and persuasively concluded that no hard and fast rule as to age and attendant applicability of Sec. 339 should be drawn. The age of the child will affect both the chance and size of resulting harm.
>
> "While dangers normally dimish with increasing age of the child, a foreseeable risk of serious harm to trespassing children, not of tender years, may still exist where dangers are latent. The age factor should therefore not be administered inflexibly as a line or formula, not elastically as a zone. We are dealing here not with a line, but a zone, not black and white but a shifting po-numbra of gray that properly falls within the rational range of the triers of fact."

A far-reaching decision of great importance is *Mann v. Kentucky & Indiana Terminal Railroad Co., 290 S. W. 2d 820.*

In that case the Court held:

(1) We are concerned with the matter of duty to the child before he strayed onto the tracks and with an infant completely incapable of discretion and wholly irresponsible for his own act.

(2) The doctrine of non-liability for injuries to trespassers is generally applicable to infants except (a) where liability may be imposed under the law of attractive nui-

sance, and (b) where one maintains on his premises something dangerous to children and so exposed that there is likelihood of their coming in contact with and being injured by it.

(3) It is under this last concept of legal duty, sometimes called an intermediate rule as between attractive nuisance and conventional liability to a trespasser, but regarded by this Court as an extension of the attractive nuisance doctrine, that the present case rests.

(4) Liability here rests upon reasonable anticipation that children might be exposed to danger, and the duty to take precaution against their going on the premises.

(5) The exception of the statutory obligation would seem to mean where such way passes over the tracks and does not terminate at the railroad; but even if it be regarded as without this qualification, the fact that fencing a switchyard under ordinary conditions is not required as a statutory duty does not absolve the railroad company from an act of diligence and care imposed by the common law under the circumstances of the particular case.

(6) The case should have been submitted by an instruction which regarded as a matter of law the switchyard as an inherent peril to a little child and left to the jury to decide issues (a) of actual or constructive knowledge of the presence of persons—especially children—in the yard sufficient to impose a duty of reasonable anticipation of the child at the time and place of the accident, and (b) whether the defendant failed to exercise ordinary care and diligence

to use such means and facilities or reasonable precaution as would reasonably protect and safeguard children of tender years from going upon the tracks, and that the plaintiff's injury was the proximate result thereof.

This holding is in keeping with Dean Roscoe Pound's statement in *13 N. A. C. C. A. Law Journal, 224-228*, where Dean Pound said, Pg. 228:

> "It is in keeping with the present trend of the law to restrict the owner's liberty of using his land and his right of prohibiting trespass by recognizing that in the crowded world of today, it must be expected that children will trespass and where such trespassers are reasonably to be foreseen, the landlord is liable for not warning or providing adequate guard or protection." See also James Inroads on *Old Tort Concepts, 14 N. A. C. C. A. Law Journal, 226, 228-231.*

The gross injustice committed in the "Mother Hubbard" opinion of the Amarillo Court is demonstrated by their attempt to claim that Brown was a trespasser and had violated the criminal statutes with reference to attempting to steal a ride on the train without securing permission of anyone in charge of the train to catch such ride. It must be remembered that it is elementary that Penal Statutes must be strictly construed to hold that these boys did not have permission to catch the train after Mr. Washington, who was in charge of the train gave them permission, *is so contrary to the law and is so far-fetched that such construction of a criminal statute does violence to the fundamental safeguards of the citizens of this country. It does prove that the Amarillo Court simply feels that because the boy*

*had been given permission to get a free ride, that it would be inequitable to hold the defendant liable. We have conclusively demonstrated by our Petition and this Supplemental Answer that such is not the law of Texas.* As a matter of fact, Mr. Justice Calvert, speaking for the Supreme Court in *Eaton v. R. B. George Investments, 260 S. W. 2d 587*, said the exact opposite on Pg. 590 of the opinion as follows:

> "The same rule in somewhat different language was recognized by the United States Court of Appeals for the Fifth Circuit in the case of Stanolind Oil & Gas Co. v. Franklin, 193 F. 2d 561, 563, when it said: 'The fact that a child may be a trespasser does not necessarily exonerate the owner of the premises accessible to children, and likely to be frequented by them, from the duty to take reasonable precautions for their safety. Under ordinary conditions, trespassing children occupy the same position of trespassing adults; and the tender age of a child, rendering it incapable of looking out for its own safety, does not raise a duty where none otherwise exists. To warrant a recovery for injury to a trespassing child, it must be shown that the injury was caused by the negligence of the owner or occupant *after the presence of the trespassing child upon the premises was known to him* or reasonably should have been foreseen by him.' A reading of the opinion of the court will reflect that a judgment for the plaintiff was affirmed, not on the theory that the defendant's shop wherein the child was injured was an attractive nuisance but on the theory that the defendant should have known that children would likely go into the shop to their injury unless it was kept locked.
>
> "'*The effect of these late cases is to abolish as to young children the distinction between trespassers, licensees and invitees when the four conditions have*

> *been satisfied and to impose on the landowner under such circumstances a duty of ordinary care to protect them from injury.* For interesting comments on the impact of the Banker decision, see case note by Vickery, 26 Tex. Law Rev. 821. Landowners' Responsibility to Children by Loen Gree, 27 Tex. Law Rev. 1, and Banker v. McLaughlin: Extension of Attractive Nuisance Doctrine in Texas by S. T. Morris, 11 Texas Bar Journal 481'."

*In this case the State Courts have disregarded substantive law in such a manner as to constitute denial of due process in that they have not only refused judgment for $150,000.00 which was the sacred property right of the minor plaintiff, but they have done so on findings of contributory negligence that are so conflicting that they will not even discuss same.* In addition to this, the law of the land has been disregarded in that they failed to submit any issues inquiring as to whether or not Norman Brown failed to exercise the care that *an ordinarily prudent boy* would have exercised. This is fatally erroneous since the burden was upon the defendant as to these issues of contributory negligence.

The omission of the term "ordinarily prudent" is reversibly erroneous under the case of *Stern v. Bensieck, 61 S. W. 594 (Missouri case).* In that case the Court said:

> "The son of the plaintiff was bound to exercise such reasonable care and caution for his personal safety while using the sidewalk as a boy of his age, experience and intelligence was individually capable of and as shown by the evidence.
>
> "It is insisted by plaintiff that the Court properly set aside the verdict for the giving of instruction No.

4, because it exacted the highest degree of care of which the boy was capable, whereas he was only required by the law of this state to exercise that ordinary care and prudence which under like circumstances, could reasonably be expected of a boy of his years, capacity and experience."

We think the Circuit Court erred in said instruction.

"The instruction exacted the highest degree of care of which the boy was capable. He was capable of exercising the highest degree of care that a boy of his age and intelligence could exercise. An adult is only required to exercise that ordinary care in traveling along the streets of a city that a reasonably prudent person would observe under similar circumstances, not the highest degree of which he is capable, and yet, this instruction exacts more of a boy of tender years than is required of an adult.

"In this case the plaintiff was required to exercise the highest degree of care of which he was capable and, hence, plaintiff's Motion for Judgment should be sustained in that there is no proper finding of contributory negligence. The cases cited in the Supreme Court opinion of *Dallas Railway and Terminal Company v. Rogers, 218 S. W. 2d 456*, are clearly in support of the view that this omission of what *an ordinarily prudent child* should have done, is fatally defective."

## CONCLUSION

The Court will bear in mind that the only excuse that the juror had for failing to admit his close relationship with the defendant's chief witness and one whose negligence was involved or could have been involved in this case was that the question was asked him *generally* instead of

*specifically.* The opinion of Mr. Justice Harlan in *Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 41 Law Ed. 979*, on page 984 is clearly in point here wherein he said:

> "This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U. S. 97, 102 (24: 616, 619). The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

And, again, we would like to quote from that great decision in *Fleenor v. Hammond, 116 Fed. 2d 982*, wherein the Court said, in speaking of due process:

> "While the phrase 'due process of law,' has never been precisely defined and perhaps is incapable of such definition, the concept is within limits capable of being fully grasped by the judicial and professional mind. It has frequently been construed as synonymous with the phrase 'according to the law of the land.' Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 A. L. R. 527, notes the general acceptance of Webster's classic commentary upon it as 'a law which hears before it condemns.' More recently it was said, Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 465, 80 L. Ed. 682, that the due process clause requires 'that state action, whether through one agency or another, *shall* be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

We respectfully submit that the Petition for Writ of Certiorari should be granted and that upon hearing, judgment should be rendered for petitioner in the sum of $150,000.00, together with interest from date of judgment at the rate of 6% per annum and, in the alternative, that this cause should be reversed and remanded to the District Court of Lubbock County, Texas, for a new trial on the merits thereof.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petitioner's brief in reply to respondent's brief in opposition to petition for writ of certiorari has been mailed this day of October, 1957, to the respondent's attorneys, as follows: Messrs. McWhorter, Cobb & Johnson, 820 Lubbock National Building, Lubbock, Texas, and to Lewis Jeffrey, Santa Fe Building, Amarillo, Texas.

Searcy L. Johnson

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